

Supporting Users Of ADR¹

I. Introduction

The long-term success of any federal ADR program depends primarily on the ability of ADR staff to provide ongoing service to the potential users of ADR. To be most effective, ADR program staff must serve as a consultant to ADR users, providing information and support services to make the use of ADR as simple and efficient as possible.

In order to provide this service to users of ADR, it is important that ADR staff be both accessible to users and be perceived as a credible source of information on ADR use in their particular dispute. Generally, this requires credibility with the individuals in your organization who make the decisions on use of ADR; staff responsible for the conduct of negotiations and first line supervisors. Therefore, it is important that ADR staff be knowledgeable about ADR techniques and how they are appropriately applied to disputes. It is also useful for ADR staff to have a basic understanding of the substantive area in which a dispute arises, including pertinent legal requirements and usual negotiation practices.

Some federal and state agencies with responsibilities over diverse types of disputes find it most useful to establish separate but coordinated ADR offices within distinct program areas in order to best support the varying needs of ADR users. For instance, ADR staff may be established in a human relations office to support employees involved in workplace disputes, while other ADR staff may be located in an enforcement or General Counsel office to support resolution of regulatory disputes.

An ADR program, regardless of location within an agency or department, should be able to provide potential users of ADR with information and expeditious access to ADR services. As described below, ADR staff should be able to assist users with every aspect of the consideration and use of an ADR process. Of course, the level of support provided by ADR staff should be at the discretion of the user of ADR and could include many roles, from information source and consultant, to provider of convening and other ADR services.

¹ This section authored by David Batson, ADR Specialist at the Environmental Protection Agency.

II. Case Screening Procedures

The ADR Act of 1996 requires every federal agency to establish procedures to ensure the appropriate consideration of ADR as a method of resolving disputes. One method used by federal agencies to ensure the routine consideration of ADR is the establishment of procedures to screen disputes for the potential use of ADR techniques. The establishment of routine screening procedures serves several purposes. It ensures the knowledgeable and routine consideration of ADR in a convenient and unintrusive way. It also ensures that agency staff are making reasonable decisions regarding ADR use. Finally, it provides information for tracking the effectiveness of ADR use.

To be effective, case screening and intake procedures must be designed to meet the needs of an agency's dispute system in a way that will not burden staff with additional paperwork or create barriers to the expeditious resolution of disputes. Where available, every effort should be made to integrate these procedures into existing systems within an agency for making and tracking negotiation process decisions. Several different approaches have proven successful in meeting these goals.

One approach is to establish an "intake system" that analyzes each dispute at the time it is first referred for resolution. Typically, this analysis is performed by an agency ADR expert alone or as part of a broader team analysis, and results in a recommendation to case staff whether or not the dispute is appropriate for ADR, and if so, the ADR technique that would be most helpful. This approach is especially beneficial where an agency has an existing intake system for evaluating the appropriate method for resolving disputes to which an ADR determination can be added. A determination on the appropriateness of ADR can also be added as a separate effort. This type of analysis supports agency dispute resolution staff by providing them with an early opportunity to analyze their negotiation strategy and determine the best approach to take in conducting the settlement.

Another approach is to require line staff to routinely consider the use of ADR as a settlement method. This approach is especially beneficial when such consideration is required and documented as part of an existing dispute tracking and referral system. For example, where an agency requires a written justification for the referral of a dispute from one office to another, the justification could include a statement of whether ADR has been used, and, if not, the reasons that ADR was not deemed appropriate. In addition, the

writing could include an analysis of settlement difficulties and how ADR might assist resolution of these problems. Of course, this approach is more heavily dependent than an intake system on the conflict assessment and ADR knowledge of individual staff members and their judgement in contacting ADR program staff for advice.

For examples of case intake and screening forms, see Appendix ____.

III. Determining Whether to Recommend ADR

Whether through a screening analysis or upon request, one of the key roles of ADR program staff is to educate and advise staff and external disputants on whether ADR use is right for their dispute. In this regard it is important to remember that the ultimate decision to use ADR always rests with the parties to a dispute. Your job as ADR program staff is to assist them in making a knowledgeable decision.

As you consider the use of ADR, we suggest that you undertake a multi-step analysis of the dispute. You should start with the presumption incorporated in the ADR Act that the use of ADR may be appropriate to assist in resolving any type of dispute for which an agency has settlement authority. Within this authority, the amount of money in dispute, the number of parties involved, or other complexities do not in themselves rule out the use of ADR. However, there are situations where the nature of the dispute weighs against ADR use. Typically, these are situations where it would not be in an agency's interest to enter negotiations or settlement discussions. The following factors as noted by the ADR Act of 1996 may indicate when ADR is not appropriate:

- whether a decision by an adjudicative body is needed by the agency for precedential value;
- whether a significant issue of governmental policy requiring development in law is present in the case;
- whether it is necessary to maintain an established policy or to avoid inconsistencies in policy that a final decision be entered;
- whether the dispute involves parties that would not be parties to the ADR;
- whether it is important to develop a full public record in the case;
or

- whether the agency has a significant jurisdictional need to maintain control of the matter or to alter the ADR outcome.

Several agencies have suggested the consideration of similar factors in guidance. See, *Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions*, US EPA (August 1987) and *Guidance on the Use of Alternative Dispute Resolution for Litigation in Federal Courts*, US DOJ (August 1992).

Assuming that an initial analysis indicates that the matter lends itself to negotiation or settlement discussions, the real focus of the analysis is to determine whether the use of ADR could assist in resolving the dispute. You should consider at least the following factors.

Is the Negotiation/Discussion Ripe for Resolution?

- Are all of the parties willing to negotiate? Are they willing to accept a call from a party or a neutral to discuss the possibility of settlement?
- Are all relevant parties involved in the dispute or discussions, including parties who, though not directly involved in the dispute, are so affected by its resolution as to be critical to its implementation? Are the parties willing to enter an analysis of additional parties to join the dispute resolution process?
- Is there sufficient time available to allow for successful negotiations/discussions to occur? Are the parties willing to enter into an agreement to provide time? (i.e. - Stay statute of limitations deadline, delay administrative action, etc.)
- Is documentation critical to the dispute sufficiently developed to provide a basis for negotiations/discussions to be successful? Are the parties willing to cooperate in developing required documentation?

In making this analysis it is important to remember that the use of ADR does not in itself create an incentive for a party to enter into settlement discussions. Such incentive must be created by other factors, including the positive leverage and sanctions that can be brought to bear by an agency. ADR can, however, assist parties by providing a neutral venue for settlement discussions to occur.

Will Use of ADR Add to Negotiation/Discussion Efficiency?

There should be an indication that use of an ADR process could help to overcome barriers to productive discussions and/or conserve parties' resources. This will be explored in more detail in the next section.

Will Parties Support Integrity of the ADR Process?

- Do parties agree to maintain the confidentiality of the selected ADR process?
- Are the parties willing to equitably share costs of ADR to ensure perception of neutral impartiality? In this regard, the costs of an ADR process can be apportioned between the parties based on their capabilities and resources.

A final note on determining whether the use of ADR is appropriate. Under the ADR Act of 1996, an agency's determination whether or not to use ADR in a particular dispute cannot be challenged in court. However, certain statutes require that in certain disputes where an agency decides not to use ADR after being requested to do so by a party to a dispute, the agency must provide the requesting party with a written explanation for that decision. (See FAR Sections 33.214(b) & 52.233-1; Contract Disputes Act, 41 UCS 605(d) & (e))

IV. Determining What Form of ADR to Recommend

The next key role of ADR program staff is to assist parties in determining which form of ADR will most fully benefit settlement efforts. A wide range of possible ADR processes exist, each designed to address a particular set of issues and dynamics faced by negotiating parties. At times, this variety of options can be quite confusing for potential users of ADR.

As noted previously, it is important to remember that ADR in all of its forms (except binding arbitration) is purely and simply a set of tools designed to assist parties to overcome difficulties inherent in the process of reaching settlement. Therefore, the key to selecting the most appropriate ADR form for a particular dispute is to match the needs of the disputants with the form of ADR that is best able to address those needs. It should be noted that in a complex dispute it is entirely possible that the use of several different forms of ADR may be warranted based on separate and distinct difficulties faced by the parties. On the other hand, in ADR programs that handle similar

types of narrow disputes there may be a preference for one type of ADR, often mediation.

The selection of an appropriate ADR form should begin with an analysis of the difficulties and challenges that hinder settlement. Explore with the parties what problems or challenges make reaching a settlement difficult or costly and how they impact the negotiation process. Experience with federal disputes indicates the following should be considered in any conflict assessment:

- personality and communication problems among participants;
- frustration of parties over not having an opportunity to vent or express feelings regarding matter in dispute;
- unwieldy numbers of participants with different agendas;
- inflexible negotiating postures of participants;
- perceived or real imbalance of power between participants;
- historic animosity between participants or perceived or real inequities from prior interactions;
- confusion over appropriate participant representatives;
- disagreements over complex technical/factual issues;
- difficulty obtaining support of affected parties and/or public for implementation of agreement; and
- need of participants to "save face" and accept outcome.

To be most effective, the analysis of a dispute should be based upon information from all parties to the dispute. ADR program staff can play a key role here since they can provide a neutral and confidential venue for opposing parties to explore their issues and concerns.

Once the difficulties and challenges have been determined, the next step is to determine what form and approach of ADR is best suited to address the needs of the particular dispute and parties. It is important to understand the basic purposes for which different forms of ADR were designed. As noted on the Dispute Resolution Continuum

chart, non-binding ADR forms can be categorized into two broad functional groups, those that are designed to facilitate the interaction of parties, and those that are designed to present an opinion for use by the parties. By design, the procedural flexibility of the parties typically becomes more restricted in use of the opinion-oriented forms of ADR than those of a facilitative nature.

Supporting Users of ADR

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The first thing to consider in analyzing a dispute is what general category of ADR best addresses the parties' needs. If the primary difficulty facing parties is the dynamics in their interaction, a facilitative form of ADR may be most appropriate. For example, mediation is a flexible process in which a neutral third party, with no decision-making authority, facilitates negotiations among the parties to help them reach a settlement.

In assisting parties a mediator may:

- bring parties together, e.g. - identify and convene a group of parties;
- establish a constructive atmosphere/context for negotiation;
- collect and judiciously communicate selected information;
- provide a neutral process for discussions allowing all an opportunity to participate;
- serve as intermediary for discussions where joint sessions are problematic;
- help parties clarify their issues and interests;
- deflate unreasonable claims and challenge commitments;
- assist parties in seeking joint gains;
- communicate the rationale for agreement; and
- keep the negotiations going.

There are a number of approaches and techniques that different mediators use to achieve these goals. Some situations are best facilitated by the parties meeting in joint session, while others are best handled through the mediator shuttling proposals between parties meeting privately. Some parties request that a mediator serve in a purely facilitative capacity, while others desire a more evaluative approach. As discussed more fully in Chapter 3, the personal style of mediation professionals should be weighed in making a selection of the appropriate neutral for a particular dispute.

Other facilitative forms of ADR use techniques similar to those utilized by mediators to assist parties in unique types of disputes. A facilitator is a specialist in assisting the conduct of meetings where the objective is increased communication but not solely the resolution of a dispute. A conveyer is a specialist who identifies parties, helps parties come together, assists them in designing an ADR process, and preparing for and overcoming barriers to settlement discussions. Partnering specialists assist parties involved in a joint project to reach agreement on a method to most effectively undertake the project with the least possible future conflict. Public participation specialists assist public and community groups to participate effectively in public hearings or other meetings with government and corporate entities. A specialist in negotiated rule-making facilitates public involvement in an agency's efforts to develop a regulation or policy through the conduct of a federal advisory committee.

If, however, difficulties facing the negotiating parties are grounded in a strongly held difference of opinion that the parties have no difficulty communicating, an opinion-oriented form of ADR may be of most benefit. This is particularly true where the difference of opinion concerns a matter of law, science, or fact and is not based solely on philosophical or ideological differences. For example, non-binding arbitration is a process where a neutral expert in the subject of the dispute issues an advisory judgment after an expedited adversarial hearing. An arbitrator assists the parties by providing them a constructive atmosphere and context in which to present their positions and by issuing a reasoned opinion on specified issues in dispute. The parties may, at their discretion, use the opinion of the arbitrator to resolve the dispute or to guide further settlement efforts.

Other opinion-oriented forms of ADR use investigative and analytical services to provide a non-binding opinion for parties in unique types of disputes. A fact-finding professional establishes a body of information and states an opinion regarding a matter in dispute. An early neutral evaluator, generally with significant trial experience with the subject of the dispute, hears a presentation of the factual and legal bases of the case in an informal conference and issues an assessment of the parties' positions. Early neutral evaluations are generally used to obtain an opinion on legal issues and are typically held prior to entering into litigation activities. A summary jury trial specialist serves in the role of jurist and conducts a short hearing in which the parties present evidence in summary form to a jury, which returns an advisory verdict. This form of ADR is usually reserved for trial-ready cases in which protracted jury trials

are anticipated and there is a significant difference of opinion between the parties on crucial issues of law or fact.

In addition, several hybrid forms of ADR have been developed that combine attributes of both facilitative and opinion oriented techniques to assist settlement efforts in specialized situations. An allocation professional assists multiple parties in the allocation of a joint liability or responsibility. In this form of ADR, used most frequently in commercial and hazardous waste cases, a neutral combines investigative, facilitative, and arbitral techniques to establish a record and render a non-binding opinion on the relative responsibility of the parties. The neutral then often mediates the parties' settlement based on the opinion. In a mini-trial, a neutral professional, serving as a jurist, conducts an informal hearing in which counsels present their positions for the consideration of the decision-makers of the parties. Following the hearing, the neutral serves as a mediator to assist the decision-makers in settlement efforts based on the information obtained in the hearing. A settlement judge, used almost exclusively by federal administrative tribunals, serves as mediator for settlement efforts of parties involved in litigation before the jurist's agency. Though serving as a mediator, the settlement judge assists the parties by sharing his or her unique knowledge of the likely outcome at trial before the agency.

A final form of ADR, that is an alternative to and not a support for settlement efforts, is binding arbitration. Though authorized for use by federal agencies in the ADR Act of 1996 and Department of Justice guidance, binding arbitration is rarely used to resolve federal disputes. Several reasons exist for this reluctance, including the fact that, except in very limited situations, decisions rendered in binding arbitration are not appealable and the perception that use of a binding third-party process usurps the role of the federal courts. To ensure the appropriate use of binding arbitration, the ADR Act of 1996 places certain limits on the use of binding arbitration and requires agencies to promulgate guidance on the scope of binding arbitration prior to its use. Despite these requirements, agencies should consider the use of binding arbitration as an alternative to traditional dispute resolution methods and non-binding ADR where it would benefit the overall goals of the agency.

In summary, assisting parties to determine the form of ADR that is most appropriate for a particular dispute is a key role of ADR program staff. In providing this service, first analyze a dispute to determine the difficulties and challenges hindering negotiation

efforts and then determine the most appropriate ADR form to address those particular needs.

For additional information on determining an appropriate ADR process, see, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, Sander & Goldberg, Negotiation Journal (January 1994).

V. Establishing Rules for Use of ADR

Prior to entering into an ADR process, parties and the selected neutral should enter an agreement regarding the conduct of the ADR process. An ADR agreement is advisable for several reasons. It protects against misunderstandings regarding the intent of the parties in the scope and conduct of the process. It also documents the intent of the parties to invoke the confidentiality provisions of the ADR Act through the appointment of a neutral. In some ADR programs where the use of a particular ADR process is routine and procedurally established, the parties may be presented with a standardized ADR agreement. In other situations, it is recommended that ADR program staff develop and make available to disputants model language for their consideration in drafting a dispute-specific agreement.

Any ADR Agreement should include the following provisions:

- a description of the ADR process to be used and scope of the issues to be addressed through the process;
- identification of the neutral to conduct the process and a statement that the neutral has been appointed by the parties to conduct the process, or that the appointment of the neutral by a sponsoring organization has been accepted by the parties, thereby invoking the jurisdiction of the ADR Act;
- a detailed time frame for the process with interim deadlines, if any;
- a description of the method of payment for neutral services and other related expenses and the responsibility of parties for such expenses;
- a detailed statement regarding confidentiality provisions that apply to participation of parties and the neutral in the ADR process;

- if required, provisions to allow for conduct of the ADR process, such as a stay of litigation or an agreement to exchange information;
- legal provisions sufficient to establish the agreement as a binding contract between the parties and between the parties and the neutral; and
- signatures of all participating parties and the neutral.

An ADR agreement is best negotiated with the involvement of the neutral selected to conduct the ADR process. Where this is not possible, ADR program staff may benefit the parties' efforts by serving as a consultant in the development of an agreement.

For examples of model ADR agreements, see Appendix ____.

VI. Educating Users to Participate in ADR

ADR program staff can be a great support to agency staff involved in an ADR process. It is important to educate staff on several key concepts needed when using ADR. Non-binding ADR is a negotiation tool and does not change in any way the responsibility of staff as representatives of the federal government for the substantive outcome of the dispute. Any final agreement must be approved through the same administrative process and memorialized in the same legally binding method (consent decree, administrative order on consent, contract, etc.) as for a similar unassisted settlement.

Likewise, the United States should be represented in the ADR process in the same manner as for a similar unassisted negotiation. This includes the involvement of technical and legal staff with appropriate settlement authority. An ADR professional, sometimes with the support of a court, may require that federal managers with ultimate settlement authority be present in negotiation sessions. In such cases, government staff should make every effort to comply with the request while preserving the authority of a federal administrative agency to determine the appropriate assignment of staff resources. Such an arrangement may include the involvement of management or their availability by phone for critical settlement meetings.

Federal staff should also remember that an ADR professional will be an advocate for a fair and efficient process of negotiation. All parties

will be expected to participate actively and in good faith in settlement activities. Staff should, therefore, enter an ADR process fully prepared for settlement discussion with direction and authority from management to fully represent his or her agency.

For a checklist of items to consider when preparing staff for use of ADR, see DOJ Client Preparation Checklist, Appendix ____ .

VII. Inclusion of ADR in Settlement Agreements

An often overlooked opportunity to use ADR is the inclusion of ADR as a dispute resolution option in agency settlement agreements. Providing parties an opportunity to use ADR as an alternative to traditional administrative dispute resolution methods may be particularly useful where it is anticipated that disagreements will arise over activities required to be undertaken by a settlement agreement.

Generally, the dispute resolution provisions of an administrative or judicial settlement agreement provide that parties enter informal settlement discussions upon notice of a dispute. If unsuccessful, the parties provide agency officials a written statement of the dispute for final determination by the agency. The final agency determination regarding the dispute is often appealable. Various forms of ADR should be considered to facilitate and increase the likelihood of success during the informal settlement stage of the dispute. Of course, any decision to allow the use of ADR in a future dispute must be considered in light of the benefits and costs to the agency associated with such a process.

A settlement document establishing ADR as an alternative dispute resolution process should, at a minimum, include a description of the following:

- the ADR process to be employed;
- the matters in dispute for which ADR may be used;
- limitations, if any, on the frequency of ADR use;
- a method for equitably sharing the expenses of the ADR process and contracting with the selected neutral; and,
- procedures for selecting an appropriate ADR professional to conduct the ADR process.

The selection of a neutral may be achieved through a variety of methods. The parties may agree on a neutral or panel of neutrals from which a neutral will be arbitrarily selected at the time of the dispute. The parties may agree to have a separate neutral party make the selection at the time of the dispute or establish a procedure for future selection by agreement of the parties.

VIII. Tracking ADR Use

The experience of participants in disputes where ADR was used or considered is an important source of information. ADR program staff can provide a valuable service by maintaining and providing agency staff access to this information, thereby supporting agency staff as they determine what ADR process is appropriate on a case by case basis and which neutral should be selected for a given case.

Information can be entered into a pre-designed database accessible by staff at a desktop computer, given a password. Case information might include:

- agency region or office
- case name
- agency contact
- issues
- date ADR use commenced
- date ADR use completed
- ADR process used
- ADR neutral provider
- case description, usually a paragraph of information which is detailed enough to provide useful information while not breaching any confidentiality concerns.

This database can then be drawn from to produce ADR status reports which can include the above information as well as:

- an overview of the agency ADR program
- recent developments in ADR which impact the program, such as:
 - ♦ federal laws
 - ♦ federal policy
 - ♦ agency ADR program initiatives
 - ♦ financial support for the use of ADR in an agency
 - ♦ ADR training
- list of agency ADR contacts and a description of their role in the agency ADR program;
- a summary of the agency ADR program, including graphs drawn from the database to show trends within programs and across agency ADR programs;
- sample consent decrees that include ADR provisions; and
- explanation of terms and abbreviations.

Support Checklist

- ✓ Establish routine dispute screening procedures
- ✓ Determine whether ADR is appropriate for the particular dispute
- ✓ Determine the appropriate form of ADR
- ✓ Draft an ADR Agreement
- ✓ Educate all staff on ADR concepts and procedures
- ✓ Include a dispute resolution option in settlement agreements
- ✓ Record and track the experiences and opinions of all participants to assist in the evaluation of the program.